IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2047 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
NATHU HATHIYA ODEDARA & ORS

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Appearance :
MR IM PANDYA APP for Appellant
DHARMESH D NANAVATY for Respondents

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE M.R. SHAH

Date : 24/10/2007

ORAL JUDGMENT : **(Per : HONOURABLE MR.JUSTICE J.R.VORA)**

1 Leave to Appeal granted. Appeal is Admitted. Learned Advocate Mr. Dharmesh D Nanavati waives for all the respondents.

2 Instant Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure, against the judgment and Order dated 27th of May, 2004, delivered by learned Additional Sessions Judge, Fast Track Court No. 4, Porbandar, in Sessions Case No. 2 of 2004, whereby present respondents, being accused of the Sessions Case, came to be acquitted by the Trial Court, for the offences punishable under Sections 302 and 114 of the Indian Penal Code as well as under Section 135 of the Bombay Police Act.

3 Learned APP Mr. I.M. Pandya for the appellant State and learned Advocate Mr. Dharmesh Nanavati for the respondents requested this Court to hear the Appeal finally at this stage as the Record and Proceedings of the Trial Court is available with this Court and that they would provide extra copies of the evidence recorded during the trial as well as the copies of the documents produced before the Trial Court. In the facts and circumstances, request is granted and the matter is heard finally.

4 As per the prosecution case, complainant - Savadasbhai Mandanbhai Odedara, was residing with his father in a joint family. His father had some dispute for the last six years with his uncle Nathu Hathia. It is the prosecution case that ancestral property of the deceased was kept by Nathu Hathia and was not intended to be partitioned by him among brothers. The incident took place on 9th of October, 2003, at 4.30 p.m. at village Degam and in the sim of village Godivalar. Deceased Karabhai Hathia had been to the field of one Amra Maharaj for agricultural work from their house situated in the field. When he walked to some distance, Nathu, Meraman Nathu, Gagu Nathu and Deva Nathu, all the accused came out of their house, which was nearby, with sticks, iron rod, etc. All the four accused assaulted Kara Hathia suddenly and inflicted many injuries. On account of this assault, Kara Hathia had fallen down, and at that juncture, complainant reached and noticed that Kara Hathia was beaten in-discriminatorily and thereafter deceased Kara Hathia was dragged by the accused and was thrown on the disputed land and accused ran towards the field of Punja Giga. The injured Kara Hathia was taken to government hospital at Porbandar and from there to the hospital of Dr. Gothania where in the morning deceased died. Complaint came to be filed by complainant before Bhagvadar Police Station and a crime came to be registered at Bhagvadar Police Station. The said complaint is

produced on record at Exhibit–19. After registration of the crime against the accused, PSI Mr. K.M. Raval. investigated the offence and submitted charge sheet in the court of learned Judicial Magistrate, First Class, Porbandar. The case thereafter was committed to the Court of Sessions and was registered as Sessions Case No. 2 of 2004. The said Sessions Case was made over to the Additional Sessions Judge, Sixth Fast Track Court, Porbandar and he framed charges against the accused for the above said offence vide Exhibit–8 on 25th of February, 2004. Accused pleaded not guilty and, therefore, they were put to trial. Prosecution examined as many as 19 witnesses and produced on record voluminous documentary evidence to prove its case and the learned Trial Judge thereafter put incriminating circumstances appearing in the evidence to each of the respondents - accused and recorded the statements of the accused under Section 313 of the Code of Criminal Procedure. The defence of the accused was of total denial, though respondents stated that, they had a dispute of the land and for which cases were pending between the parties and on that account they were involved in the said case. After hearing the prosecution and the defence, the learned Trial Judge acquitted the accused and, hence, this Appeal by the State.

5 Learned APP I.M. Pandya for the State and learned Advocate Mr. Nanavati for the respondents were heard in detail om

respect of this Appeal.

6 We have gone through the Record and Proceedings of the Trial Court minutely and thoroughly. We have examined the appreciation of evidence undertaken by the Trial Court and the conclusions arrived at for acquitting the accused. We have also examined the reasons assigned by the Trial Court for the above said conclusion. We have considered the vital features of the matter and reasonable probabilities arising out of the circumstances of the case, particularly with reference to the appreciation of evidence undertaken by the Trial Court and the conclusions arrived at. Both the learned Advocates have taken this Court to each corner of the Record and Proceedings.

7 Going through the evidence of prosecution, the prosecution has examined Dr. Sureshbhai Veljibhai Koriya as PW-8, examined at Exhibit-52, who conducted the postmortem of the deceased, and accordingly he conducted postmortem on 9th of October, 2003 at 10.05 hours and completed the examination at 11.55 hours. He mentioned external injuries in Column - 17 of postmortem note which he produced on record at Exhibit-53. There were internal injures corresponding to the external injuries and injures were anti-mortem. According to his

opinion, cause of death was acute cardiac respiratory arrest due to haemorrhagic shock external as well as internal due to multiple injury over body. Therefore, the prosecution established that the death of the deceased was culpable homicide, though there is no dispute in this respect.

8 While scanning the other evidence, it is found that complainant Savadasbhai Mandanbhai Odedara, examined at Exhibit-18 as PW-1 stated that at the time of incident, he was at his residence and when he came out, heard shouting of the deceased, he found that the deceased was lying in bleeding condition. He was declared hostile as he did not support the prosecution case even though he was an important eye witness. PW-2 Hiriben Devshibhai, examined at Exhibit-20 and PW-3 Devshibhai Gigabhai, examined at Exhibit-21, according to prosecution case, were doing agricultural work in nearby field. Both witnesses have turned hostile and did not support the prosecution case as to have noticed the incident. Exhibit-22 PW-4 Arbham Lilabhai and Exhibit-24, PW-5 Rambhai Navghanbhai are panchas of scene of offence and that panchnama is at Exhibit-23, but none of the witnesses supported the panchnama and the prosecution case. PW-6, examined at Exhibit-25, Kirit Premjibhai and PW-9 Dineshbhai Dudabhai, examined at Exhibit–55 are the panchanas of

panchnama at Exhibit-26, it is the prosecution case that, by this panchnama, the accused had presented the clothes which they had worn at the time of committing the offence and the clothes had bloodstains. The said panchnama Exhibit–26 has not been supported by any of these two witnesses and they were declared hostile by the prosecution. In the cross-examination also, nothing fruitful comes out from these witnesses. PW-7 Tulsidas Motiram, examined at Exhibit-27 and PW-10, examined at Exhibit 56 Rajubhai Maldevbhai, are the panchas of panchnama Exhibit–28, by which all the accused jointly volunteered before the panchas and the police to show the weapons which they had used in the crime and took them to the place where the weapons were concealed. Those weapons were, according to the prosecution case, attached in the presence of panchas, but non of these two panchas has supported the prosecution case. PW-11, examined at Exhibit – 57, Madnabhai Hathiabhai stated that at the time of the incident, he was at his filed and when the deceased was going to the field of one Amrabhai, he was killed. He happens to be the brother of the deceased. However, his evidence is neither here nor there though he stated that his brother was done to death, but nowhere in his deposition, he stated that who, in fact, killed his brother Karabhai Hathiabhai. From this, it clearly appears that this witness has no personal knowledge of the incident. Deceased had two wives and they

are examined at Exhibit–58 Kariben Karabhai and Exhibit– 59 Rabhiben Karabhai as PW-12 and 13. They had no personal knowledge of the incident and stated that while their husband had been to the field of one Amrabhai Maharaj, somebody had killed their husband. Though, the accused were identified by the witnesses as the accused were relatives of the deceased. Two other witnesses examined by the prosecution are PW-14, examined at Exhibit-60 Puniben Mandnabhai and PW-15, examined at Exhibit-61 Liliben Savadasbhai are the relatives of the deceased. According to these witnesses, there was, in fact, no dispute about he land between the deceased and the accused and these witnesses denied that the incident had occurred when Karabhai was going towards the field of one Amrabhai Maharaj. According to the prosecution case, these two witnesses noticed the accused dragging the deceased in the disputed land between the parties, but this fact is not supported by these two witnesses in their deposition and they were turned hostile. PW-16 Devabhai Vajsibhai Goraniya, examined at Exhibit- 62 and PW-17 Chanabhai Pujabhai Odedara, examined at Exhibit-63 are two witnesses and neighbours of the deceased. They deposed their ignorance as to the incident though according to the prosecution case, they were important witnesses. Both the witnesses were cross-examined by the prosecution, but nothing fruitful could be extracted from them. PW-18, examined at Exhibit–64 Himmatrav

Vaman Patil is the PSO, who recorded the complaint of the complainant, as forwarded to him by PSI on 10th of October, 2003 at about 20.45 hours. He recorded the crime vide Crime Register No. 100 of 2003 and entrusted the investigation to PSI Mr. K.M. Raval. Last witness PW-19 Kevalbhai Markandarai Raval, is examined at Exhibit-66. According to him, on 9th of October, 2003, he came to know that one entry was made in police station, Bhagvadar, vide Register No.55 of 2003 at 18.00 hours that one Karabhai had received injuries in a scuffle and was admitted to Bhavsinhji Hospital, Porbandar, and found that the injured was shifted to Jamnagar G.G. Hospital and from there, according to the witness, the injured was shifted to Vishwa Hospital of Dr. Godhaniya. Witness went to the said hospital and found that the treatment was given to the injured. On the next day, deceased died and a complaint came to be recorded by him of Savadasbhai, nephew of the deceased Karabhai Hathiabhai. A crime came to be registered. He investigated the offence, submitted the charge sheet.

9 From the above evidence, it is crystal clear that no iota of evidence could be brought by the prosecution to involve the accused in this serious crime. It is found that most of the witnesses, who were eye witnesses, have not supported the prosecution case . Even complainant – Savadasbhai, who reached first in time at the scene of offence, did not

support the prosecution case for whatever reason and, therefore, there is no evidence at all against any of the accused to link them for the charges levelled against the accused.

10 While appreciating the other circumstantial evidence, it is found that the Investigating Officer has drawn discovery panchanama at Exhibit–28, though the panchas of the said panchnama have turned hostile, but still the panchnama can be proved by the Investigating Officer as well. When we scanned the evidence of the Investigating Officer PW-19, we found that, no such attempt was made by the prosecution to get this panchnama proved through the Investigating Officer. He stated to the extent only that vide the discovery panchnama the weapons used in the crime were attached by him in the presence of panchas. Therefore, the discovery panchnama by which the weapons were discovered could not be proved by the prosecution. Otherwise, it is found that the Investigating Officer adopted an illegal method of joint discovery from all the accused. Joint discovery is prohibited by law and many times the Apex Court has deprecated this attempt. Even the Division Bench of this Court in the mater of VALA MANA VAGHRI & ORS vs. THE STATE OF GUJARAT, as reported in 1996 (2) GLH 933, observed that joint discovery was an illegal method, usually adopted by the Investigating Agency. After referring to a decision of the Apex Court

in the matter of MOHD. ABDUL HAFEEZ vs. STATE OF ANDHRA PRADESH, as reported in AIR 1983 SC, 367, in para-8, this Court deprecated the practice of joint discovery at the instance of more than one accused. It was also directed that the concerned DSP or Police Commissioner or DIG or the Secretary, Home Department, might issue necessary circular in this respect. This is sheer carelessness in investigation and even after repeated guidelines by the Apex Court and by this Court, we found that the Investigating Agency has resorted to joint discovery by the accused, which is deprecated being illegal method of investigation. It appears that, even after mandated by this Court in VALA MANA VAGHRI vs. STATE OF GUJARAT (supra), no action appears to have been taken either by the State Government or concerned high police officials. Therefore, the discovery at the instance of more than one accused, as adopted in this case, during the investigation, is again deprecated and such joint discovery is not at all useful to the prosecution.

11 The second circumstance by which it is the prosecution case that the clothes of the accused attached by the Investigating Agency vide panchanama had bloodstains having blood group of the deceased. Panchas of this panchanama at Exhibit-26 have not supported the prosecution case, even then, the panchnama could have been proved by

the Investigating Officer. While we scanned again the evidence of the Investigating Officer, we found that in very cursory manner in chief-examination, the Investigating Officer is asked about this panchnama. Investigating Officer PW-19 stated only to the extent that through a panchnama, clothes worn by the accused at the time of committing the crime were attached by a panchnama. However, the learned APP conducting the trial appears to be very perfunctory as he failed to confront the Investigating Officer with the said panchnama to confirm the signature of the Investigating Officer or the panchas who might have signed in the presence of the Investigating Officer. The said panchanama has not at all been shown to the Investigating Officer PW-19. Thus, the said panchnama could not be proved by the prosecution and therefore it could not be proved also that any clothes of the accused were recovered from them, which contained blood group of the deceased.

12 Thus, while we undertook the re-appreciation of the evidence, we found that the only view which could be taken from the evidence recorded is to acquit the accused as the prosecution failed to establish the case against any of the accused. The view taken by the Trial Court for acquitting the accused is probable and possible view from the evidence recorded during the trial and from the circumstances appearing from the matter, no second view is possible. The reasonings

assigned by the Trial Court for the conclusion are based on correct appreciation of the evidence as recorded and, hence, the judgment and order impugned in this Appeal warrants no interference at all. In view of this discussion, following order is passed.

"Appeal stands dismissed."

(J. R. VORA, J.)

(M. R. SHAH, J.)

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